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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA

10 ALTARA MICHELLE,

11 Plaintiff,

12 v.

13 ARCTIC ZERO, INC.,

14 Defendant.

Civil No. 12cv2063 GPC (NLS)

Consolidated with:

12cv2279

12cv2284

12cv2544

12cv2593

12cv2647

15 **ORDER GRANTING IN PART**  
16 **DEFENDANT'S MOTION FOR A**  
17 **PROTECTIVE ORDER AND**  
18 **OTHER SANCTIONS AND**  
19 **REQUIRING FURTHER**  
20 **BRIEFING**  
21 **[Doc. No. 53]**

22 Defendant, Arctic Zero, Inc., filed a motion seeking a protective order and other  
23 sanctions against Plaintiff, Altara Michelle, for intercepting privileged test results  
24 pursuant to an allegedly improperly-issued subpoena. (Dkt. No. 53.) Michelle filed an  
25 opposition, arguing she had an agreement with former defense counsel to share lab  
26 results, and even if the intercepted results were privileged, Arctic Zero waived the  
27 privilege by posting the test results on its public website. (Dkt. No. 59.) Arctic Zero  
28 filed a reply asserting it never agreed to share lab results with Plaintiff and that it posted  
redacted test results on its website. (Dkt. No. 61.)

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1 **I. Relevant Background.**

2 On August 20, 2012, the Today Show published an article claiming Arctic Zero  
3 misstated the calorie content of its frozen dessert products. (Dkt. No. 53-1 at 4.) The  
4 next day, Michelle filed a purported class action complaint against Arctic Zero, alleging  
5 Arctic Zero deceptively labeled its products in violation of California's unfair  
6 competition and false advertising laws. (Dkt. No. 1.) On September 21, 2012, before  
7 Arctic Zero filed an answer or counsel completed a Rule 26(f) conference, Michelle  
8 served EMSL Analytical, Inc. ("EMSL"), the lab used by the Today Show, with a  
9 subpoena requesting any and all test results related to Arctic Zero's products. (Dkt. No.  
10 59 Ex. C.) Michelle alleges she served Arctic Zero with a copy of the subpoena via mail  
11 and fax the same day. *Id.*

12 On September 26, 2012, Michelle contacted Arctic Zero, via email, to request a  
13 meeting to discuss test results that Michelle obtained from Kappa Labs, an independent  
14 laboratory. (Dkt. No. 59 Ex. D.) In the email, Michelle said she was still waiting for the  
15 production of EMSL's test results, pursuant to the subpoena. *Id.* The next day, both  
16 parties participated in a conference call. (Dkt. No. 59-4 ¶ 7.) Michelle alleges that  
17 during this call the parties agreed to informally share information and lab results, in an  
18 effort to "proceed to an early mediation." *Id.* On October 26, 2012, Arctic Zero  
19 substituted in the law firm of Braunjagey & Borden LLP as its attorneys of record. (Dkt.  
20 No. 19.) New counsel filed an answer for Arctic Zero on October 28, 2012. (Dkt. No.  
21 20.) The next day, Michelle filed a motion to consolidate cases and asked that her  
22 counsel be appointed as interim lead counsel. (Dkt. No. 21.)

23 On November 8, 2012, Michelle received lab results from EMSL, pursuant to the  
24 September subpoena. (Dkt. No. 59-4 ¶ 9.) Unbeknownst to Michelle, Arctic Zero had  
25 requested a nutritional analysis of its products by EMSL in September 2012, after the  
26 Today Show article was published. (Dkt. No. 53-1 at 4; Dkt. No. 59 at 4.) In addition to  
27 the Today Show results, Michelle received the lab results from the tests that Arctic Zero  
28 commissioned. (Dkt. No. 59-4 ¶ 9.) Michelle claims she did not think these lab results

1 were privileged material because Arctic Zero agreed to share results and did not object to  
2 the original subpoena. (Dkt. No. 59-4 ¶ 9.) Michelle did not tell Arctic Zero of the  
3 documents received, or send copies of the materials to Arctic Zero. *Id.* Even though the  
4 subpoena directed EMSL to produce documents only to Michelle's counsel, Michelle  
5 somehow believed Arctic Zero would have also received a copy of the results of the  
6 subpoena from EMSL. (Dkt. No. 59-4 ¶ 9; Dkt. No. 59 Ex. C.) Arctic Zero claims it did  
7 not agree that Michelle could obtain its test results, nor did it know that Michelle received  
8 such results from EMSL. (Dkt. No. 61-1 ¶¶ 3, 5.)

9 In November 2012, Arctic Zero learned that Michelle intended to serve a subpoena  
10 on the Today Show seeking all documents and communications concerning Arctic Zero.  
11 (Dkt. No. 53-1 at 5.) On December 4, 2012, Arctic Zero wrote to Michelle, objecting to  
12 the subpoena as improper under Federal Rule of Civil Procedure 26 and requesting copies  
13 of any other outstanding subpoenas. (Dkt. No. 53-2 Ex. 2.) Michelle withdrew the  
14 subpoena to the Today Show but ignored Arctic Zero's other request, and did not provide  
15 any information about the subpoena she served on EMSL in September or the lab results  
16 received in response. (Dkt. No. 53-2 ¶ 10.)

17 Meanwhile, on December 3, 2012, Michelle had filed an opposition to a counter-  
18 application to be appointed interim lead counsel and replied to an opposition to her other  
19 application to be appointed interim lead counsel. (Dkt. No. 59-4 ¶ 10.) In those filings,  
20 which were served on Arctic Zero, Michelle said she received EMSL's lab results from  
21 tests that Arctic Zero commissioned. *Id.* As a result, Michelle contends that the court  
22 and all counsel were on notice that Michelle received the results Arctic Zero  
23 commissioned, pursuant to the September subpoena. (Dkt. No. 59 at 5.)

24 On March 11, 2013, Arctic Zero sent Michelle a letter expressing concerns about  
25 the merits of Michelle's claim. (Dkt. No. 53 Ex. 3.) On March 14, 2013, this Court held  
26 a status conference and issued an order setting deadlines to hold a Rule 26 discovery  
27 conference, submit a proposed discovery plan, exchange initial disclosures, and return for  
28 a case management conference. (Dkt. No. 41.)

1 On March 18, 2013, Michelle responded to Arctic Zero's letter and referred to the  
2 results of the nutritional analysis ordered by Arctic Zero. (Dkt. No. 53 Ex. 4.) Arctic  
3 Zero claims it never knew that Michelle had these test results before receiving the March  
4 18<sup>th</sup> letter. (Dkt. No. 53-1 at 2.) On April 4, 2013, both parties participated in a  
5 telephonic case management conference. (Dkt. No. 42 at 2.) During the conference,  
6 Arctic Zero alleges it asked Michelle how it came into possession of the lab results  
7 referenced in the March letter. (Dkt. No. 53-2 ¶ 16.) Arctic Zero followed up with  
8 written correspondence later that day and asked Michelle to provide (1) all  
9 communications containing or referring to the test results commissioned by Arctic Zero;  
10 and (2) information about any other individuals who received a copy of the results. (Dkt.  
11 No. 53 Ex. 5.)

12 Even though Arctic Zero had expressly requested this information on December 4,  
13 2012, Michelle waited until it received a second request and sent Arctic Zero a copy of  
14 the September subpoena and the lab results received pursuant to the subpoena on April  
15 10, 2013. (Dkt. No. 59 Ex. E.) Michelle did not, however, provide Arctic Zero with the  
16 two categories of requested information regarding communications and recipients. (Dkt.  
17 No. 53 ¶ 17.) On April 12, 2013, Arctic Zero asked Michelle to meet and confer  
18 regarding the subpoena and suggested corrective measures Michelle could take to avoid  
19 judicial intervention. (Dkt. No. 53 Ex. 7.) Sometime after receiving Arctic Zero's  
20 request, Michelle contends that the EMSL lab results ordered by Arctic Zero were  
21 displayed on its public website. (Dkt. No. 59-4 ¶¶ 16, 17, 18.) Arctic Zero contends that  
22 although it decided to post select test results on its website, significant details were  
23 omitted. (Dkt. No. 61 at 4.) Arctic Zero again asked Michelle to meet and confer on  
24 April 22, 2013, but Michelle never responded. Michelle's counsel alleges that because  
25 the parties were engaging in settlement discussions, she thought the subpoena matter was  
26 settled. (Dkt. No. 59-4 ¶ 19.)

27 On May 16, 2013, Arctic Zero filed the instant motion for a protective order and  
28 other sanctions. Arctic Zero requests the following relief: (1) a protective order or

1 injunction prohibiting Michelle from retaining, using and/or disseminating the privileged  
2 documents or summaries thereof; (2) discovery related to Michelle's counsel's receipt,  
3 transmission, use and/or reference to the privileged documents; (3) revocation of the pro  
4 hac vice admissions of Michelle's non-California counsel; (4) suspension of Michelle's  
5 counsel as interim lead counsel; and (5) an award of attorney's fees and costs that Arctic  
6 Zero incurred in filing this motion.

## 7 **II. Discussion.**

### 8 **A. Propriety of the Subpoena.**

9 Under Federal Rule of Civil Procedure 26(d), "a party may not seek discovery  
10 from any source before the parties have conferred as required by Rule 26(f)," unless by  
11 court order or agreement of the parties. Fed. R. Civ. Proc. 26(d); *see Arista Records LLC*  
12 *v. Doe 1-43*, 2007 WL 4538697 \*1 (S.D. Cal. Dec. 20, 2007). While Federal Rule of  
13 Civil Procedure 45 does not specify when a subpoena may be issued, because a subpoena  
14 is considered a discovery device, it is subject to the provisions of Rule 26(d). *Integra*  
15 *Lifesciences I, Ltd. v. Merck KGaA*, 190 F.R.D. 556, 561-62 (S.D. Cal. 1999).  
16 Additionally, before serving a subpoena requesting the production of documents, a party  
17 must give notice to all parties involved. Fed. R. Civ. Proc. 45(b)(1). The purpose of this  
18 rule is to allow an opposing party an opportunity to object. Fed. R. Civ. Proc. 45  
19 advisory committee's note.

20 Michelle served a subpoena on EMSL, requesting all test results related to Arctic  
21 Zero's frozen dessert products, on September 21, 2012, more than one month before  
22 Arctic Zero formally appeared in this case and six months before the Rule 26(f)  
23 conference. It is unclear, though, whether Arctic Zero received notice of the subpoena.  
24 Although Michelle provided proof of service by mail and fax in her opposition to the  
25 motion, Arctic Zero contends no such copy was found in the former defense counsel's  
26 file. (Dkt. No. 53-2 ¶ 4.) As part of its response to Michelle's opposition, Arctic Zero  
27 submitted the declaration of former defense counsel, Ronald McIntire. (Dkt. No. 61 Ex.  
28 1.) Mr. McIntire says he never agreed to share Arctic Zero's test results with Michelle.

1 (Dkt. No. 61-1 ¶ 3.) While he says he never knew Michelle obtained the EMSL test  
2 results he does not squarely address whether he received notice of the September 21<sup>st</sup>  
3 subpoena, as shown on the proof of service. (Dkt. No 59 Ex. C.)

4 This Court therefore orders Arctic Zero to provide a supplemental declaration from  
5 Mr. McIntire squarely addressing whether he ever received notice of the subpoena. If he  
6 did not receive notice, Mr. McIntire shall outline his law firm's procedures that were in  
7 place to ensure that he would have seen the subpoena, had it been properly served. The  
8 Court will then consider whether Michelle and her counsel violated Rule 26(d) or Civil  
9 Local Rules 83.4(a)(1)(f) and 83.4(b)(2)(g), and if so, the appropriate sanctions.

#### 10 **B. Assertion of Privilege.**

11 The Federal Rules of Civil Procedure allow parties to obtain discovery regarding  
12 any nonprivileged matter relevant to a party's claim or defense. Fed. R. Civ. Proc.  
13 26(b)(1). The Rules protect confidential communications between attorneys and clients,  
14 as well as documents prepared by a party in anticipation of litigation. *Upjohn Co. v.*  
15 *United States*, 449 U.S. 383, 389 (1981); *Admiral Ins. Co. v. U.S. Dist. Court for Dist. of*  
16 *Arizona*, 881 F.2d 1486, 1496 (9th Cir. 1989). Arctic Zero claims the subpoenaed  
17 documents Michelle received are privileged, but Arctic Zero does not provide any detail  
18 as to which documents are privileged or the type of privilege it asserts.

19 Pursuant to Rule 26(b)(5), the Court orders Arctic Zero to produce a privilege log  
20 expressly claiming the information that is privileged or subject to protection as trial-  
21 preparation material, and describing the nature of the documents, communications, or  
22 tangible things. Arctic Zero shall file and serve the privilege log, and shall also lodge  
23 with Chambers the actual privileged documents, so that the Court can review them in-  
24 camera. Without such information, this Court cannot evaluate Arctic Zero's claim of  
25 privilege or properly assess Arctic Zero's request for sanctions.

#### 26 **C. Request for Expedited Discovery and Other Sanctions**

27 Additional information is necessary to determine whether Michelle's alleged  
28 misconduct merits imposition of the sanctions sought, including a protective order,

1 revocation of pro hac vice status, suspension of counsel, and attorney's fees. For this  
2 reason, the Court grants Arctic Zero's request to conduct expedited discovery related to  
3 the subpoena. The Court reserves judgment on all other requested sanctions pending  
4 receipt of the privilege log and privileged documents, and the other court-ordered  
5 supplemental briefing.

6 **D. Attorney's Fees and Costs.**

7 The Court continues to consider the question of attorney's fees and costs. Arctic  
8 Zero is ordered to submit an amended fee request and supplement the original  
9 information submitted with (1) the addition of hours expended on conducting the  
10 expedited discovery; and (2) information about the background and experience of its  
11 counsel in relation to the hourly billing rates charged.

12 **III. Order.**

13 For good cause shown, the Court **GRANTS** in part Arctic Zero's motion for a  
14 protective order, and reserves judgment on the remaining issues. The Court **ORDERS**:

15 (1) The Court **GRANTS** Arctic Zero's motion for expedited discovery regarding  
16 Michelle's receipt and use of documents received pursuant to the September subpoena.  
17 By **July 26, 2013**, Michelle must identify to Arctic Zero all parties who reviewed, used,  
18 or obtained knowledge of the subpoenaed documents or their content; produce all  
19 communications with EMSL, and all documents produced by EMSL or any other party in  
20 response to the September subpoena; and produce all documents referring to, re-  
21 transmitting, summarizing, copying or otherwise commenting on the subpoenaed  
22 documents. By **August 2, 2013** Arctic Zero shall identify any witnesses it seeks to  
23 depose as a result of this discovery, and those depositions shall take place by **August 16,**  
24 **2013**.

25 (2) By **August 2, 2013**, Arctic Zero shall file a supplemental declaration of Ronald  
26 McIntire to address notice of the September subpoena; submit a privilege log detailing  
27 the information that is privileged or subject to protection as trial-preparation material; and  
28 lodge for in-camera review the documents purported to be privileged.

1 (3) If Arctic Zero does not take any witness depositions related to the expedited  
2 discovery, it shall also file, by **August 2, 2013**, its amended fee request and any  
3 supplemental brief - no longer than five pages - addressing issues raised through the  
4 expedited discovery. If Arctic Zero does take depositions related to the expedited  
5 discovery, the supplemental brief and amended fee request shall be filed by **August 23,**  
6 **2013**.


7 (4) Michelle shall file an opposition - no longer than five pages - to any  
8 supplemental brief and amended fee request within seven calendar days of Arctic Zero  
9 filing those documents.

10 (5) Arctic Zero may file a reply - no longer than three pages - within five calendar  
11 days of the opposition being filed.

12 The Court **RESERVES** judgment on Arctic Zero's motion for a protective order;  
13 revocation of the pro hac vice admissions of Michelle's non-California counsel;  
14 suspension of Michelle's counsel as interim lead counsel; and an award of attorney's fees  
15 and costs pending review of the future submissions.

16 **IT IS SO ORDERED.**

17 DATED: July 18, 2013

18   
19 Hon. Nita L. Stormes  
20 U.S. Magistrate Judge  
21 United States District Court  
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